



Homeland Security

August 28, 2015

REQUEST FOR RECONSIDERATION

FOR: Karen Gorman and Olare Nelson
DOJ Office of Special Counsel

FROM: Ellen Gallagher 

SUBJECT: OSC File No. DI-14-5115

Purpose: Consistent with our telephone conversation on August 12, 2015, I am writing to request your continued involvement in the above-referenced matter notwithstanding a decision by the DHS Office of the Inspector General (DHS OIG) to open a related case concerning the systematic use of administrative and disciplinary segregation in immigration detention.

Discussion: The OSC File No. DI-14-5115 includes alleged violations of law, rule, or regulation that contribute to an ongoing abuse of authority and create a substantial and specific danger to public health and safety. Over the past 11 months, I have forwarded additional information in the form of expert medical reports and memoranda, segregation reports, press accounts and articles pertaining to the impact of solitary confinement, authorities governing the DHS Office for Civil Rights and Civil Liberties (CRCL), and internal complaints and communication in an attempt to convey the nature and scope of this problem. While the DHS OIG has indicated that his office will investigate the treatment of individuals with disabilities in immigration detention, including placements with or without medical and procedural protections in administrative and disciplinary segregation, he has stated that he will not examine the actions or inaction of CRCL, especially with regard to U.S. Immigration and Customs Enforcement (ICE) and the DHS Office of the Secretary.

As set forth in my original filing, CRCL is statutorily mandated to "investigate and resolve civil rights and civil liberties complaints regarding Department policies or activities, or actions taken by Department personnel."¹ This duty is further delineated in numerous directives, e.g., DHS/CRCL Directive 046-01-001, and repeated in CRCL's public facing material.² Despite the fact that CRCL is tasked by law with investigating and resolving civil rights and civil liberties complaints, the organization has consented verbally and in practice to not acting upon an alarming number of violations of detainee rights documented in weekly segregation reports and discussions.³ This has been explained at various points as a means of preserving CRCL's relationship with ICE, which is marked by potential conflicts of interest such as the assignment and

¹ See 6 U.S.C. § 345; Section 705, Homeland Security Act of 2002 (as amended). This provision also requires the Officer for Civil Rights and Civil Liberties to: (4) oversee compliance with constitutional, statutory, regulatory, policy and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department.

² See CRCL's official website at: www.dhs.gov/file-civil-rights-complaint.

³ The reports are created pursuant to ICE Directive 11065.1, *Review of the Use of Segregation for ICE Detainees*, September 2013, which prohibits CRCL from using the information ICE shares with it in any CRCL investigation or inquiry. This same point is featured in the attached (June 29, 2015) correspondence from the Senate Judiciary Committee to DHS Secretary Jeh Johnson.

promotion of staff within and across the two offices. In addition to not investigating or attempting to resolve individual abuses documented in the segregation reports, CRCL maintains with regard to the broader universe of complaints it receives, including those filed by or on behalf of detainees in short and longer-term detention facilities, that the organization is “a policy office, not a redress office,” except with regard to Title VI and Section 504.⁴ I have shared with you – most recently in emails sent on August 21, 2015 – justifications offered for CRCL’s practice of inviting, receiving, and utilizing information from individual complaints to promote general redress policies and procedures, but not to ensure the investigation or resolution of those same complaints. I have also provided at your request a sample CRCL reply letter, which was featured during a January 30, 2015, briefing sponsored by the U.S. Commission on Civil Rights (USCCR).⁵ A variation of this notice is applied to cases referred to CRCL by the DHS OIG.⁶ As illustrated by the second sample reply, CRCL routinely returns referred cases to the DHS OIG, simultaneously advising complainants that CRCL lacks authority to investigate or resolve their individual concerns, but will “use complaints like yours to find and address problems in DHS policy and its implementation.”⁷ It is my understanding that CRCL does not notify members of the public in advance of their filing individual complaints that the office has no intention of investigating or resolving those same complaints.⁸ Furthermore, to the extent CRCL utilizes individual complaints to identify and investigate broader problems in DHS policy and its implementation (in the detention context this translates into site visits with CRCL staff and paid consultants rendering written reports that contain findings and recommendations for ICE and/or U.S. Customs and Border Protection), CRCL does not publicize those findings and recommendations until they receive a response from the targeted component. With regard to recommendations sent to ICE on detention conditions and the use of administrative and disciplinary segregation, it is common knowledge within CRCL that ICE “never replies.” This creates a closed informational loop, explained by CRCL as necessary to preserve “deliberative privilege;” CRCL does provide an Annual Report to Congress that typically contains a generalized version of its work by topic.⁹

Conclusion: Given the urgent nature of cases involving immigration detainees with mental health conditions placed without proper care and oversight in administrative or disciplinary segregation, and CRCL’s statutory mandate, a continued focus by the OSC on CRCL’s posture as “a policy office, not a redress office” is warranted, both to protect vulnerable individuals and to inform the DHS OIG’s future investigative actions. Where CRCL is the only office within DHS mandated to investigate and resolve civil rights and civil liberties complaints, its refusal to act on individual cases, including cases contained in the weekly segregation reports, creates a substantial and specific danger to the health and safety of immigration detainees as well as the broader universe of people affected adversely by DHS policies or activities, or actions by DHS personnel.

⁴ See Attached email dated May 15, 2014, titled, [REDACTED] A recent settlement in the case of *Franco Gonzalez v. Holder* establishes under the Due Process Clause of the U.S. Constitution and Section 504 of the Rehabilitation Act the right to legal representation for a plaintiff class and sub-classes consisting of: *All individuals who are or will be in [Department of Homeland Security (“DHS”)] custody for [immigration] proceedings in California, Arizona, and Washington who have been identified by or to medical personnel, DHS, or an Immigration Judge, as having a serious mental disorder or defect that may render them incompetent to represent themselves in [immigration] proceedings, and who presently lack counsel in their [immigration] proceedings.* *Sub-Class 1: Individuals in the above-named Plaintiff Class who have a serious mental disorder or defect that renders them incompetent to represent themselves in [immigration] proceedings. Sub-Class 2: Individuals in the above-named Plaintiff Class who have been detained for more than six months.* Many individuals who are or may be covered by the *Franco-Gonzalez* settlement continue to appear on weekly segregation reports received and reviewed by CRCL along with information indicating that they are seriously mentally ill and lack counsel. Even with CRCL’s acknowledged redress authority under Section 504, the organization maintains the same prohibition with regard to acting on information contained in the segregation reports.

⁵ Attached is a copy of the unedited transcript of Panel I from the briefing, wherein the USCCR Chairman asks the CRCL Officer at pages 37-41 about her handling of individual complaints.

⁶ See Attached letter dated September 3, 2014 from CRCL regarding Complaint No. 14-09-ICE-0364.

⁷ This language appears in both types of CRCL reply letters.

⁸ [REDACTED]

⁹ See *supra*, note 5, at pages 39-40.